

The Great Repression

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Maximilian Steinbeis Fr 29 Nov
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When Jens Söring last was a free man, a wall still ran through Berlin and through Europe and through the whole world. Willy Brandt was still leading the SPD, Jörg Haider not yet the FPÖ. Microsoft shares were available for purchase for six weeks. Reagan and Gorbachev had not yet met in Reykjavik, the hand of God / Maradona had not yet deflected that ball into the English goal, and outside the Soviet Union only few were aware that a nuclear reactor had just blown up in Ukraine.

33 years. A lifetime, as they say. That is how long Jens Söring was a prisoner, and many believe innocently so. Now he will be released.

The story of this man, who claims to have tried to save his girlfriend from the gallows for the double murder of her parents by making a false confession, is the subject of many heart-wrenching news stories in these days. But the human interest aspect is only one side of it.

Soering v. United Kingdom

Jens Söring, then a lovesick 19-year-old, had fled with his girlfriend to England, and both were arrested there in April 1986. The US government demanded his extradition and the British granted it against the assurance of the US prosecutor that the judge would be informed of the wish of the British government that no death penalty would be imposed and carried out. That was little more than a cruel joke, and Söring turned to the European Court of Human Rights in Strasbourg. On 7 July of that momentous year 1989, the Court delivered its judgment.

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Article 3(3) of the Convention on Human Rights prohibits torture and inhuman treatment. Death row in Virginia easily fits that description. The USA, however, is not bound by the ECHR, whereas the UK, on the other hand, is but can't be blamed for what happens in Virginia. Nevertheless, according to the Strasbourg Court, the British government had violated Söring's human rights. The inhuman treatment he was facing in Virginia was not just the responsibility of the perpetrating non-member state but also that of the surrendering member state:

It would hardly be compatible with the underlying values of the Convention (...) were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed.

From today's point of view that may look almost like a no-brainer. Of course you're responsible if you knowingly send someone in harm's way, how wouldn't you? Since 1989, the ECtHR has hung so many verdicts on this hook that it is hardly recognizable any more under all the weight it bears. But that hook was Jens Söring's case, and it was on 7 July 1989 that it was firmly pegged into the emerging European house of justice and human rights. (On the same day, what a coincidence, Gorbachev et.al. in Bucharest condemned the dilapidated Eastern bloc to demolition, by the way.)

Refoulement

The ban on extradition to unsafe places, turned by the ECtHR into a human right in *Söring*, had already a long history in refugee law: *non-refoulement*, Article 33 of the Geneva Convention. No refugee may be transferred to a place where he is threatened with persecution or ill-treatment. It's called asylum for a reason.

The word *refoulement* is French, like so much in international law. It's original meaning is holding off something which tries to push and squeeze in, but also "repression" in the psychoanalytical sense: *refoulement* is what you do to things which keep popping up inside ever more persistently the harder you try to keep them out. Ultimately, you seem to succeed: They are gone, nowhere to be seen, somewhere else, not your problem any more. This is when the nightmares start.

In a well-ordered community of equal and sovereign states, each with its own territory and population minding their own business, there should be no need for such a thing. *Refoulement* already implies that things are in disarray, that some states are doing evil stuff on their territories to their populations which consequently start squeezing and pushing against the border and across it, disturbing the conscience and the sleep of the righteous who, on top of it, might get accused of giving shelter to terrorists and insurgents and criminals and interfering in their internal affairs by the evil ones, so they might think: well, okay then, let's hand them over and be done with it, let the peaceful community of sovereign states be restored and everything will be fine again. The refugees will be gone, nowhere to be seen, somewhere else, not their problem any more, so they can return to being righteous just like before.

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When the Eastern bloc was still standing, it was still rather clear who were the evil and who the righteous, and the temptation to level that difference through an order of sovereign equality was small. But this has changed to a dizzying extent since those days. What do you do when it's a collapsed asylum system in Greece people suddenly start fleeing from? When Macedonia lets a US intelligence service kidnap a German and drag him to Afghanistan to torture him for apparently no good reason at all? When the Italian

coastguard stops a refugee boat in the middle of the Mediterranean and pushes their passengers directly back to Libya? When you ask dictators and warlords to take those who flee from dictators and warlords and protect them in your place, while our very own Federal Interior Minister just a year ago would have preferred to defend our territorial sovereignty by "rejecting refugees at the border"? Righteous or evil? Let's all take a long, hard look into the mirror, friends.

This summer, there were reports that the German police had finally managed to deport a guy named Ibrahim Miri, allegedly the boss of a huge clan of partly criminal Lebanese Kurds, to what was supposed to be his home country. Lebanon had for a long time washed its hands of the man and his whole extended family, it wasn't even certain that they were Lebanese citizens in the first place. That, however, did not deter Dieter Romann, our fabulous Federal Border Police Chief of imposing physical stature, who is on the friendliest of terms with many a uniformed and mustachioed security officer in the Middle East and allegedly made some calls and pulled some strings until the necessary entry papers for Mr. Miri miraculously appeared, much to the disgruntlement of the Lebanese judiciary. That is how these things are taken care of in the community of equal sovereign human rights violators, isn't it? Order had been restored and everything was fine again, and the terrible Mr. Miri was gone, nowhere to be seen, somewhere else, not our problem any more. For a little while that was, because a few weeks after he popped up right in the middle of Bremen, claiming asylum because over in Lebanon, he said, there were people trying to kill him.

Needless to say, I have no sympathy for any gangster boss regardless of his origin, and would certainly be extremely afraid if I were so unlucky as to fall into the hands of Mr. Miri and his goons. But neither my sympathy nor my fear are a criterion for whether Mr. Miri or anyone else should be exposed to a danger to life and limb or not. It would hardly be compatible with my, your and Dieter Romann's commitment to human dignity if we knowingly surrendered a fugitive to a place where there were substantial grounds for believing that he would be in danger of being subjected to death, however heinous the crimes allegedly committed.

Wouldn't it?

Classics

Speaking of epochal ECtHR judgments: DANA SCHMALZ predicts that there will be another of those in the line of *Söring* soon. It is about whether **Italy** can be made responsible for human rights violations by the Libyan coastguard in bringing up refugee boasts because of the cooperation between both.

So, what else was going on this week? An awful lot, actually.

The **German** Federal Constitutional Court has once again proven its prowess in shaping the European *Verfassungsgerichtsverbund* with a double whammy of decisions about the Right to be Forgotten, literally redesigning large parts of the German and European

fundamental rights architecture. In terms of doctrinal importance, WALTHER MICHL sees these two decisions on a level with the classics from the golden 50s such as *Lüth* or *Apotheker*. JENS MILKER praises the way in which Karlsruhe secures itself a voice in the trilogue with the ECtHR and the ECJ.

In **Poland**, the great constitutionalist Wojciech Sadurski stood trial this week, accused of having "insulted" the governing PiS party. More than 300 constitutional law and political scientists have signed the call for solidarity for Sadurski so far, still counting. JOHN MORIJN and BARBARA GRABOWSKA-MOROZ attended the trial and report on what they have seen and heard. MICHAŁ KRAJEWSKI and MICHAŁ ZIÓLKOWSKI analyse the ECJ ruling on judicial independence in Poland from the previous week and come to the conclusion that Luxembourg has handed the Polish judges a powerful, albeit misusable tool against their PiS-appointed wannabe disciplinary guardians.

In **Hong Kong**, the High Court had the courage to declare the ban on face masks for protesters unconstitutional, provoking a massive backlash from Beijing. ALVIN CHEUNG sheds light on the background and the implications. HANS PETTER GRAVER sees parallels to the occupied Norway in the 1940s. PHILIPP RENNINGER explains the CCP ideology in Beijing and its hostility towards liberal constitutionalism in general.

Speaking of **Norway**: HALVARD HAUKELAND FREDRIKSEN defends Norwegian EU jurisprudence against the massive accusations made last week by the former President of the EFTA Court, Carl Baudenbacher.

In the German state of **Berlin**, the government has decided on a radical capping scheme for skyrocketing residential rents, and many believe that the state level is not competent to regulate this matter at all. SELMA GATHER, MAIKE VON RESTORFF and FLORIAN RÖDL show why this opinion is based on a misunderstanding of the relationship between private and public law.

In the federal state of **Ethiopia**, the so-far nine states will, after a referendum, soon be ten. YONATAN FESSAH is concerned about the consequences of such ethnic fragmentation.

In **Germany**, some high-profile NGOs have been stripped of their tax privileges lately, but also associations which accept exclusively men or women as members. The latter is the aim of legislation proposed by the Federal Minister of Finance. ULRIKE SPANGENBERG analyses how this relates to the the ban on gender discrimination.

Is it a coup what happened in **Bolivia**? A revolution? ANDREW ARATO weighs the arguments.

In **Hungary**, the Fidesz government seems to have abandoned its plans to tailor a pleasantly non-independent administrative judiciary to its own needs, but instead has sneakily introduced an omnibus law which includes provisions hardly less horrible. VIKTOR KAZAI reports.

Bulgaria has established one of the most aggressive confiscation regimes in Europe. Now the ECJ has to assess whether this is in line with European law. BLAGA THAVARD is not at all satisfied with the Opinion of AG Sharpston in this matter.

Elsewhere

MARTINA TRETTEL reports on the forthcoming independence referendum on the island of **Bougainville**, still a part of Papua New Guinea but maybe not for long any more.

DENIS BARANGER has misgivings about President Macron's plans to hold a climate change referendum in **France**.

ANNA WÓJCIK describes how the PiS government in **Poland**, unfazed by last week's ECJ ruling, continues to mistreat its ever-less-independent judiciary.

JULIETA SUÁREZ CAO, JAVIERA ARCE-RIFFO and JAIME BASSA MERCADO worry whether the planned election procedure for the Constitutional Convention in **Chile** will provide for sufficient legitimacy.

In the run-up to the elections in the **UK**, ROBERT HAZELL and HARRISON SHAYLOR answer ten questions about the possibility that there will a hung parliament again.

NEIL H. BUCHANAN has little hope for the future of **American** democracy in view of the fact that House Republicans, after all what's been revealed, *still* keep supporting Trump.

DOLORES UTRILLA examines the latest ECtHR decision on freedom of expression for government critics in **Russia**.

JAAGO HUUSA compares 'One Country, Two Systems' in Hong Kong with **Finland's** status in pre-revolutionary Russia.

That's all for now. (This editorial comes later than usual, my apologies. This was a pretty extreme week.)

All the best, and if you support us on Steady, even more good things to you! (if not: [here](#))

Max Steinbeis



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All the best, *Max Steinbeis*

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